STATE OF MICHIGAN

COURT OF APPEALS

CARLEEN J. BASA, f/k/a CARLEEN J. GAUTZ, Plaintiff-Appellee,	UNPUBLISHED August 4, 2009
v	No. 287311 Livingston Circuit Court
ANDREW J. BASA, Defendant-Appellant.	LC No. 05-037123-DM

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to change domicile of the parties' two minor children from Howell, Michigan to Alexander, Arkansas. We reverse and remand for further proceedings consistent with this opinion.

I

The parties were married in 1998 and lived together in Howell. Two children were born of the marriage: Chloe, born September 1999, and Karl, born June 2002. In 2003, the parties separated, and they were divorced on January 5, 2006. A default judgment of divorce awarded the parties joint legal custody, plaintiff was awarded primary physical custody, and defendant was given "reasonable and liberal" parenting time. On July 5, 2007, citing economic hardship, plaintiff moved in the trial court to change domicile of the minor children from Howell to Arkansas where her parents were located. In August 2007, before the motion was heard, plaintiff quit her job, left the minor children in defendant's care, and moved to Arkansas.

In January 2008, the trial court held a two-day evidentiary hearing to address the change of domicile factors pursuant to MCL 722.31(4). The trial court found that plaintiff met her burden under the statute and specifically found that a joint custodial environment existed with both parties. The trial court later held a best interests hearing in April 2008, during which plaintiff testified that she had obtained full-time employment in Arkansas earning $16 an hour. In August 2008, the trial court reversed its earlier determination that a joint custodial environment existed and held that, because there was no established custodial environment with defendant, no best interests analysis was required. It granted plaintiff's motion to change domicile.

II

Defendant argues on appeal that the trial court erred in applying the change of domicile factors under MCL 722.31(4) and determining that the change of domicile was warranted. We agree. A trial court's findings in applying the factors under MCL 722.31(4) are reviewed under the great weight of the evidence standard. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). Under that standard, we will affirm a trial court's factual findings "unless the evidence clearly preponderates in the opposite direction." *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). A trial court's decision on a request for a change of domicile is reviewed for an abuse of discretion. *Grew v Knox*, 265 Mich App 333, 339; 694 NW2d 772 (2005).

MCL 722.31(4) states as follows:

> (4) Before permitting a legal residence change otherwise restricted by subsection (1),[1] the court shall consider each of the following factors, *with the child as the primary focus in the court's deliberations*:
>
> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [Emphasis added.]

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[1] MCL 722.31(1) states, in part: "Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued."

"The moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle, supra* at 203.

With regard to factor (a) the trial court found that the change in domicile had the capacity to improve the lives of the children and plaintiff primarily because the move would provide financial stability for plaintiff. We find that the trial court's concerted focus on defendant's financial weaknesses in its application of this factor does not comport with the statute's requirement that the court conduct its review "with the *child as the primary focus* . . . ." MCL 722.31(4) (emphasis added). In addition, we conclude on the record before us that some of the court's findings under factor (a) are against the great weight of the evidence. The court found that defendant failed to provide "consistent or adequate financial support for the children during and after the marriage" and that defendant failed to pay "regular and consistent" child support. Both of these findings are against the great weight of the evidence. Plaintiff testified that during the marriage and before the parties were separated, defendant worked up to three jobs at a time to provide for the family. Essentially, the trial court critiqued defendant's inability to establish economic independence and ultimate necessity to move in with his father as failure to provide for the children, while it critiqued plaintiff's similar inability to establish economic independence and necessity to live with her parents in Arkansas as the establishment of "financial stability." Additionally, evidence showed that defendant always made his child support payments except for one period when he lost his job, and that he worked to repay one-third of the arrears after obtaining employment. Plaintiff forgave the remainder of the arrears. In addition, when plaintiff was struggling financially, defendant offered to care for the children and plaintiff's son by another relationship, Damien. The court also critiqued defendant's missed child support payments as a failure to provide for his children, yet the court failed to consider that plaintiff did not offer any financial support for the children during the entire year she left the children in defendant's care and resided in Arkansas. The trial court's finding that defendant's ability to provide suitable housing was "in question" is also against the great weight of the evidence. Defendant testified that church assistance allowed his father to avoid foreclosure on his home, where defendant and the children resided. But, even if defendant's father lost his home at some point, the evidence established that defendant and his wife had sufficient income to provide suitable, alternative housing.

The court also erred in its review of factor (a) when it overemphasized plaintiff's improved life in Arkansas instead of focusing on the benefits to the children from the move. Instead of focusing on defendant's failures and plaintiff's improved financial stability, the trial court should have focused its analysis on whether a $4.34 hourly wage increase and proximity to plaintiff's parents had the capacity to improve the children's lives even though the move would result in a loss of the continued presence of defendant in their everyday lives, connection to the community where they lived since birth, and ties to family living in Michigan.

With regard to factor (b), the court found that following the "separation and divorce," defendant did not exercise "consistent parenting time." We find that the trial court erred in applying this factor and that its findings are against the great weight of the evidence. The statute requires an inquiry into "[t]he degree to which each parent has complied with, and utilized his or her *time under, a court order governing parenting time with the child* . . . ." MCL 722.31(4)(b) (emphasis added). The trial court's inquiry should have been limited to whether defendant exercised "reasonable and liberal" parenting time as provided by the default judgment of divorce.

The trial court's finding that defendant failed to exercise "consistent parenting time" after the judgment of divorce was entered is against the great weight of the evidence. While there was a short period of time where defendant did not have contact with the children, he cared for them, on average, two to three overnights every week and alternating weekends from summer 2006 until August 2007. From August 2007 forward, defendant provided full-time parental care for the children while plaintiff was in Arkansas.

With regard to factors (c), (d), and (e), we conclude that the trial court's findings are not against the great weight of the evidence. Nevertheless, we conclude that the trial court abused its discretion in granting the motion to change domicile where its decision rested on erroneous findings as to the other factors. On remand, the trial court must reconsider the factors set forth in MCL 722.31(4) and determine whether plaintiff established by a preponderance of the evidence that a change of domicile is warranted. *Mogle, supra* at 203. Assuming that plaintiff can meet her burden on remand, we consider defendant's other issues on appeal.

III

After applying the factors in MCL 722.31(4), as set forth above, and before granting a motion to change domicile, a trial court must determine "whether granting [the] plaintiff's motion for a change of domicile would result in a change of an established custodial environment . . . ." *Rittershaus v Rittershaus*, 273 Mich App 462, 470; 730 NW2d 262 (2007). If the trial court finds that a custodial environment exists with the non-moving party, "[t]he issue then becomes whether . . . [the] proposed parenting time schedule effectively amount[s] to a change in the established custodial environment so as to require an inquiry into the best interest factors . . . ." *Brown, supra* at 596. If the relocation amounts to a change in an established custodial environment, the moving party then has the burden of proving by clear and convincing evidence that the proposed change in domicile is in the children's best interests. *Id*.

Defendant argues that the trial court erred in determining that no custodial environment existed with defendant and that no best interests analysis was required. Again, we agree. The determination whether a custodial environment exists involves a question of fact, *Rittershaus, supra* at 471, which we review under the great weight of the evidence standard, *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

MCL 722.27(1)(c) states, in pertinent part:

> The custodial environment of a child is established if over an appreciable time the *child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.* The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [Emphasis added.]

In this case, the trial court's determination that no custodial environment existed with defendant was against the great weight of the evidence. Here, the record evidence showed that, since their birth, defendant has been actively involved in the children's lives, at least the majority of the time. Defendant resided with Chloe for the first three years of her life and Karl for the first year of his life. Defendant has consistently provided financial support for the children, with the exception of one period when he was unemployed, visited with the children, and provided

parental care for the children. For approximately one year before plaintiff moved to Arkansas, defendant, on average, had two to three overnight visits with the children every week in addition to his parenting time on alternating weekends. After plaintiff moved to Arkansas the children resided with defendant full time for approximately one year before the trial court issued its order permitting the change of domicile in August 2008. During that year, defendant was essentially the only parent involved in the children's daily lives, and he was solely responsible for meeting all of the children's financial and material needs without receiving any support from plaintiff. Defendant, his new wife, or a caretaker would transport the children to and from school every weekday where they were performing well, and defendant's workplace accommodated the children's school schedule as needed. Defendant and his wife helped the children with their schoolwork, and defendant brought the children to Sunday school at a local church and introduced Chloe to a youth group at the church. In addition, defendant testified that the children felt free to communicate their concerns to either him or his wife. Furthermore, the children's psychologist testified that Chloe did not want to leave defendant and move to Arkansas; she was fearful of not being able to see defendant again.

The trial court's reasoning in support of its determination that no custodial environment existed with defendant is unpersuasive and lacks legal merit. The court referenced "additional testimony" at the evidentiary hearing in April to support its determination, yet it did not indicate what additional testimony established that Chloe and Karl did not look to defendant for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Additionally, the court reasoned that the children's living arrangement in the year preceding the court's order changing domicile was only temporary and that all parties involved were aware of this. However, reasoning that the nine-year-old and six-year-old children would refrain from looking to defendant for "guidance, discipline, the necessities of life, and parental comfort" merely because the court was eventually going to enter an order is attenuated at best. Moreover, the reasoning is contrary to established law. A custodial environment can be established as a result of a temporary arrangement. *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008). The trial court also failed to cite anywhere in the Child Custody Act, MCL 722.21 *et seq*., to support the proposition that public policy, something relied on by the trial court, is an appropriate consideration in determining whether a custodial environment exists. Finally, the trial court's reliance on case law was misplaced.

Because we find that there was an established custodial environment with both plaintiff and defendant, the trial court was required to determine whether the proposed parenting arrangement would change that custodial environment. *Brown, supra* at 596. On this record, we find that parenting time during summer vacations and alternating holidays would result in a change in the custodial environment with defendant, who had full time care of the children at the time the order was issued and had substantial, regular contact before that time. Therefore, the trial court was required to conduct a review of the statutory best interest factors, MCL 722.23, to determine if plaintiff established by clear and convincing evidence that the change in domicile is in the children's best interest. *Brown, supra* at 596. The trial court did not do so. Rather, it made findings of fact regarding the best interest factors, stated the findings were really unnecessary, and failed to weigh the factors using the appropriate burden of proof.

IV

Defendant also argues on appeal that the trial court's findings with regard to several of the statutory best interest factors were erroneous. A trial court's application of the statutory best interest factors involves findings of fact, which we review under the great weight of the evidence standard. *Fletcher*, *supra*. On review of the record, we find that several of the court's factual findings were against the great weight of the evidence because the evidence clearly preponderates in the opposite direction.

We first find several underlying factual findings by the trial court to be against the great weight of the evidence, although the ultimate findings on the factors related to those findings were not. See MCL 722.23(a), (b), and (e). With respect to factor (a), which concerns "[t]he love, affection, and other emotional ties existing between the parties involved and the child," MCL 722.23(a), the trial court found that defendant exercised inconsistent parenting time during the months before plaintiff moved to Arkansas. In fact, the record revealed that defendant exercised parenting time on average of two to three days every week and alternating weekends for almost one year before plaintiff moved to Arkansas. Nevertheless, the finding that factor (a) favored defendant with respect to Chloe and was equal for both parties with respect to Karl was not against the great weight of evidence.

With respect to factor (b), concerning "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any," MCL 722.23(b), the trial court weighed this factor equally between both parties. In doing so, it found that religion was not a significant part of the children's lives, that "concerns" during the time period when plaintiff was the children's primary caregiver were caused in significant part by defendant, and that there was "little evidence to demonstrate [defendant's] capacity or willingness to provide the children with love, affection or guidance." These underlying factual findings are against the great weight of the evidence. During the nearly year-long period that the children lived with defendant, they attended Sunday school and Chloe attended a Wednesday youth group at a local church. In addition, the trial court failed to articulate the "concerns" that were caused by defendant and did not consider defendant's offer to provide full-time care for the three children while plaintiff was experiencing financial difficulties in Michigan. Furthermore, the evidence shows that defendant demonstrated a capacity and willingness to provide love, affection and guidance to the children by caring for them full time, without issue, for a year before the trial court's ruling. Initially, defendant resided with the children and plaintiff, and he would work multiple jobs to ensure his family had income and allow plaintiff to be a stay-at-home mother. Following the parties' separation, plaintiff and the children spent weekends at defendant's apartment, and thereafter defendant had overnight visits with the children on Wednesdays and every other weekend. While there was a period of a few months where defendant was absent from the children's lives, his involvement increased in the summer of 2006. He was caring for them two to three times a week plus every other weekend, and he eventually became their full-time parent. However, while there were several erroneous factual findings by the trial court, its ultimate finding that the parties were equal on this factor was not against the great weight of the evidence.

Factor (e) concerns "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court weighed this factor equally between both parties after noting that both plaintiff's and defendant's living arrangements are familiar to

and consistent for the children. The trial court's underlying findings as to factor (e) are against the great weight of the evidence in that they are incomplete and fail to consider the beneficial and negative aspects of uprooting the children from the Howell community. More importantly, the finding failed to consider Chloe's feelings of abandonment by plaintiff. This fact concerns the permanence of the family unit and should have been considered. Nevertheless, on the record, the ultimate finding that the parties were equal on this factor was not against the great weight of the evidence.

With respect to factors (c), (d), and (j), we conclude that there were underlying factual findings that were against the great weight of the evidence and the ultimate factual findings were also against the great weight of the evidence. Factor (c) concerns "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The trial court weighed this factor in favor of plaintiff after finding, in part, that "[defendant's] financial support of the children during the marriage and after the divorce has been inadequate and inconsistent." The trial court's finding regarding defendant's financial support of the children is against the great weight of the evidence, as is the ultimate finding that this factor favored plaintiff. From 2000 to 2003, defendant worked up to three jobs to provide for the family, and he was their only source of income. With the exception of one period where he was unemployed, he always paid child support. Furthermore, defendant offered to provide full-time care for the children when plaintiff was struggling financially in Michigan. After plaintiff moved to Arkansas defendant was the sole source of income for the children while plaintiff, despite earning more than defendant, failed to offer any support to the children during the year she resided there. With regard to medical care, there is nothing in the record that suggests defendant was deficient in ensuring that the children's medical needs were met. The evidence clearly preponderated in finding the parties equal under factor (c).

With respect to factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial court weighed this factor in favor of plaintiff and found that the children's needs would be met while living in Arkansas. The trial court also found that "[i]t is unclear" whether defendant's father's home will be maintained," and it noted the negative aspects of defendant's work schedule. These findings are against the great weight of the evidence. The trial court failed to cite facts in the record that support the contention that the living arrangement in Arkansas, where the children will be separated from defendant, will serve to meet their emotional needs. The trial court's findings concerning defendant's living arrangements are unsupported by the evidence, and the trial court failed to reference the negative aspects of plaintiff's work hours in Arkansas, which would provide her with limited time for the children as well. Additionally, the trial court failed to consider the beneficial and negative aspects of removing the children from the Howell community, where they have established ties to the community through school and church, and where they are close to extended family. The evidence clearly preponderated in favor of defendant with respect to factor (d) where he had maintained the children in their home community, in a single residence with his father, and in close proximity to their known schools and church.

Finally, factor (j) concerns "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other

parent or the child and the parents." MCL 722.23(j). In weighing this factor in favor of plaintiff, the trial court found, in part, that defendant did not return plaintiff's telephone calls after she moved to Arkansas or help the children communicate with plaintiff, and noted that defendant and his wife scheduled their wedding on a date when plaintiff planned to meet with Chloe for a counseling session. In addition, the court found that defendant made demeaning comments about plaintiff. The trial court's underlying findings with respect to this factor are against the great weight of the evidence as is the ultimate finding that the factor favored plaintiff. The trial court failed to consider whether plaintiff's move to Arkansas, as opposed to attempting to establish herself in Michigan, facilitated the children's relationship with defendant. In addition, in its application of the next factor (factor (k)), the trial court noted that both parties made "demeaning comments to the other," yet the court only referenced the demeaning comments made by defendant in its analysis of this factor. Furthermore, in regard to its finding that defendant failed to answer or return plaintiff's telephone calls, the trial court failed to consider that, at the best interest hearing, plaintiff acknowledged that the children were made available to her for telephone calls and agreed that her contact with the children was going well and that her calls were returned "most of the time . . . unless something comes up with the schedule or they're working late." In addition, plaintiff acknowledged that, after the first court session, Chloe went through a phase where she did not want to speak with plaintiff on the telephone. Defendant testified that he encouraged the children to speak with plaintiff on the telephone and plaintiff had visitation with the children over the Christmas holiday in 2007. There is no indication that defendant interfered with this visit, or that plaintiff wanted to travel to Michigan to visit with the children at any other time after she moved to Arkansas. With respect to defendant's wedding plans, the trial court failed to consider both that plaintiff had ample notice of the cancellation, and that the wedding was planned before defendant was informed of the counseling session. These facts do not suggest that defendant deliberately interfered with plaintiff meeting Chloe for therapy as the trial court implied in its order. The evidence clearly preponderated in a finding that this factor was equal to both parties.

With respect to the remaining factors, we conclude that the trial court's findings are not against the great weight of the evidence. On remand, assuming the trial court finds that plaintiff has established by a preponderance of the evidence that a change of domicile is warranted, the court needs to reconsider, on the record as a whole, its findings with respect to factors (c), (d), and (j), and it needs to apply the appropriate clear and convincing burden of proof when weighing whether a change in the custodial environment is in the children's best interests. *Brown*, *supra* at 596.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane M. Beckering